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MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Petrich Family Limited Partnership

OBJECTOR: Trout Unlimited

CASE 43B-0354-R-2021

43B 101013-00

43B 101014-00

ORDER ON MOTION FOR SUMMARY JUDGMENT

Objector Trout Unlimited (“TU”) filed a motion for summary judgment seeking an order limiting the period of use for water right claims 43B 101013-00 and 43B 101014-00 to May 1 to July 15 each year. TU bases its motion on a decree issued by a state district court in *Gerald F. Petrich, et al. v. Archibald and Margaret E. Allen, et al.*, Cause No. 11616 (Mont. Sixth Jud. Dist., Park County, July 22, 1964) (“*Petrich Decree*”). Claimant Petrich Family Limited Partnership (“Petrich”) opposes the motion.

UNDISPUTED FACTS

1. The Water Court included claims 43B 101013-00 and 43B 101014-00 in the Preliminary Decree for the Yellowstone River Basin Above and Including Bridger Creek (Basin 43B). Claims 43B 101013-00 and 43B 101014-00 are based on statements

of claim Gerald F. Petrich and Eunice A. Petrich filed in 1981. (Doc. 13.00¹, Ex. C and Ex. D).

2. The Preliminary Decree describes claim 43B 101013-00 as a decreed right to use water from Mill Creek for irrigation with a June 4, 1963 priority date, and a period of use from April 15 to September 15 each year.

3. The Preliminary Decree describes claim 43B 101014-00 as a decreed right to use water from Mill Creek for irrigation with a June 3, 1963 priority date, and a period of use from April 15 to September 15 each year.

4. Petrich owns water right claims 43B 101013-00 and 43B 101014-00 as successor in interest to Gerald F. Petrich and Eunice A. Petrich.

5. The statement of claim forms filed for claim 43B 101013-00 and 43B 101014-00 each describe the period of use as April 15 to September 15 each year. Both statements of claim describe the claims as “decreed” rights.

6. In 1938, the District Court decreed water rights from Mill Creek in the case *Sallie A. Allen, et al. v. N.F. Wampler, et al.*, Cause No. 7583 (Mont. Sixth Jud. Dist., June 1, 1938) (“*Allen v. Wampler Decree*”). (Doc. 13.00, Ex. F).

7. In 1964, the District Court issued a supplemental decree as to water rights from Mill Creek in the *Petrich Decree*. (Doc. 13.00, Ex. A).

8. The *Petrich Decree* was an action filed by three sets of plaintiffs pursuant to § 89-829, R.C.M. (repealed). The plaintiffs sought water rights from Mill Creek beyond what the District Court previously decreed in the *Allen v. Wampler Decree*. The plaintiffs sought the supplemental water rights to divert water to a new ditch. Gerald F. Petrich was one of the plaintiffs.

9. The Complaint and Petition initiating the action named as defendants other persons with water rights on Mill Creek. (Doc. 13.00, Ex. G). Several defendants answered and cross-claimed or counterclaimed for supplemental decreed rights of their

¹ Docket entry 13.00 is the set of exhibits TU filed in support of its motion, together with a foundational affidavit. The docket number refers to the document sequence in the Court’s electronic case file system.

own. The defendants sought supplemental water rights to divert additional water to several existing ditches.

10. Following a trial, the District Court made findings of fact, including the following:

That the Court finds that during the months of May and June and until approximately the 15th day of July of the normal irrigating season there is flowing in Mill Creek at the headgate of the Mill Creek Flat Ditch approximately 10,000 miners' inches of water in excess of the total quantity of water heretofore adjudicated and decreed by this Court in the aforesaid action.

(Petrich Decree, Findings of Fact, ¶ II).

11. Based upon this and other findings of fact, the District Court also made conclusions of law, including the following:

The Court concludes, as a matter of law, that each of the parties to this action are the owners of and entitled to the possession of their respective lands as described in their complaints and cross complaints filed herein and in these Findings of Fact; and that each of the parties to this action are owners of the right to the use of that quantity of the waters of Mill Creek and its tributaries in addition to their previous decreed rights, hereinabove set forth in said findings of fact ***.

(Petrich Decree, Conclusions of Law, ¶ II).

12. The District Court decreed water rights to both the plaintiffs and defendants. The District Court decreed to the three sets of plaintiffs, including Gerald F. Petrich, water rights with both June 3, 1963 and June 4, 1963 priority dates. The District Court decreed to the defendants water rights with a June 4, 1963 priority date. *(Petrich Decree, Conclusions of Law, ¶ III, No. 35 and No. 36).*

13. Claim 43B 101013-00 is based on the June 4, 1963 right decreed by the District Court. Claim 43B 101014-00 is based on the June 3, 1963 right decreed by the District Court.

14. Additional facts are discussed below as necessary.

ISSUE

Should the Court limit the period of use of claims 43B 101013-00 and 43B 101014-00 to May 1 to July 15 each year?

DISCUSSION

A. Summary Judgment Standard.

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court views the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. “All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.*

Where the moving party demonstrates there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26, 304 Mont. 356, 362, 22 P.3d 631, 636. The non-moving party “must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements.” *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990). The question of whether the moving party is entitled to summary judgment under the undisputed facts ultimately is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

B. Application

As an objector, TU must prove “that the elements of the claim[s] do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.” Rule 19, W.R.Adj.R. TU may meet this burden by producing evidence “that overcomes one or

more elements of the prima facie statement of claim.” *In re Burkhartsmeyer*, Case 40G-2, 1997 Mont. Water LEXIS 1, *17.

TU limits its motion to the period of use and period of diversion elements of the two claims. TU argues it meets its burden to overcome the prima facie status of these elements as a matter of law because the claims were filed as “decreed” rights, and the dates specified in the *Petrich Decree* are more limited than the periods of use and diversion in the Preliminary Decree.

The Water Use Act requires the Water Court to describe several specific elements of each state-based existing water right included in a final decree, including “the inclusive dates during which the water is used each year.” Section 85-2-234(6)(h), MCA. These dates are the period of diversion and period of use of a water right. Adjudicating period of diversion and period of use defines when water diversions and use under a water right may begin and must end, and when a water user may call for water each year. Water use outside or beyond the periods the Court adjudicates is not part of an existing water right. Because the periods of diversion and use are the same for the two claims, they will be referred to collectively as the “period of use” in this Order.

The findings of fact in the *Petrich Decree* specify that water is available from May to mid-July in Mill Creek in excess of what the District Court previously decreed. The period of use dates for claims 43B 101013-00 and 43B 101014-00 do not match the findings of fact in the *Petrich Decree* because the Preliminary Decree describes the period of use as April 15 to September 15 for both claims. Because the facts found in the *Petrich Decree* are undisputed, TU argues it meets its burden to prove by a preponderance of evidence that the Preliminary Decree dates are wrong and should be modified to May 1 to July 15 to match the *Petrich Decree* dates. Petrich responds with several arguments why the Court should deny TU’s motion.

1. *Did the District Court decree period of use?*

Petrich argues TU’s motion should be denied because disputed issues of material fact exist as to period of use. Petrich does not dispute the *Petrich Decree* “says what it

says.” (Doc. 15.00, at 7). Petrich also does not dispute the District Court made a finding of fact that excess water was available in Mill Creek only from May through mid-July. Nonetheless, Petrich argues a fact issue exists because period of use does not appear in the conclusions of law entered by the District Court. (Doc. 15.00, at 3, 10).

Petrich’s argument is inconsistent with the evidentiary basis of a “decreed” right. The Water Use Act requires a statement of claim to include “evidence in support of the claim.” Section 85-2-224(2), MCA. The statement of claim form incorporates this requirement by requiring claimants to identify the “type” of right on a claim form. The “type” of right states “the historical basis of an existing water right.” Rule 2(a)(70), W.R.C.E.R. (defining “Type of Historical Right”). The type of existing right ultimately does not matter for purposes of administering water or describing the elements of a water right in a final decree. *In re Danreuther Ranches*, 2013 Mont. Water LEXIS 5, *2 (“[t]he Water Court does not distinguish between use rights, filed rights, or decreed rights when it issues final decrees”). But it does matter for purposes of adjudicating the elements of the right.

The Water Court recognizes several types of claims in the adjudication, including claimed decreed rights, filed rights, use rights, and reserved rights. A decreed right is “a claimed water right determined in a judicial decree prior to the commencement of this adjudication or after commencement of this adjudication.” Rule 2(a)(18), W.R.C.E.R.² When a claimant claims a decreed right, the Court determines what the district court decreed by examining the language and context of the prior decree.

The District Court issued the two Mill Creek decrees pursuant to a statute the 1921 Montana legislature passed codifying private water right adjudication proceedings. Ch. 228, Laws of 1921. The 1938 *Allen v. Wampler Decree* awarded water rights to the

² For adjudication purposes, the Water Court incorporates the definitions in the Water Right Claim Examination Rules, unless the context requires otherwise. Rule 2(b), W.R.Adj.R.

various parties identified in the decree. Under the framework of the 1921 statute, the *Allen v. Wampler Decree* caused Mill Creek to be an adjudicated stream.

The 1921 legislation included a process to appropriate additional water on a previously adjudicated stream. Section 89-829, R.C.M. 1947 (repealed). The process required filing with the clerk of district court a petition describing:

[T]he amount of water sought to be appropriated, a description by name or otherwise of the watercourse or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, showing the proposed means of appropriation and use of the water, and also the place of use thereof.

Section 89-829(1)(b), R.C.M. 1947. Following the filing of a petition, the 1921 statute required a district court to conduct a proceeding and, if the evidence warranted, to “enter an interlocutory or permanent decree allowing the appropriation sought, either in whole or in part, subject to the terms of all prior decrees.” Section 89-831, R.C.M. 1947 (repealed). In *Anaconda Nat’l Bank v. Johnson*, 75 Mont. 401, 411, 244 P. 141 (1926), the Montana Supreme Court concluded this was the exclusive method to appropriate water on an adjudicated stream after the effective date of the 1921 statute.

The District Court conducted the 1964 *Petrich Decree* proceeding to supplement the *Allen v. Wampler Decree*. The plaintiffs initiated the proceeding because they wanted to build a new ditch to divert previously unadjudicated water from Mill Creek and convey it to their properties. Their complaint alleged “Mill Creek has surplus or extra water that has not been previously decreed.” (Doc. 13.00, Ex. G, ¶ 3). The defendants answering the complaint did not dispute surplus water was available in Mill Creek; instead, they counterclaimed, asking to Court to decree water they apparently already were diverting at various other ditches. The counterclaims mostly followed a similar format, alleging more specifically that “there has been flowing in Mill Creek during the months of May and June and generally until approximately the 15th day of July, an estimated 10,000 miner’s inches of water in excess of the total amount of water adjudicated in” the *Allen v. Wampler Decree*. (See, e.g., Doc. 13.00, Ex. H, Leo Briggs Counterclaim, ¶ IV).

In the *Petrich Decree*, the District Court addressed whether there was surplus water in Mill Creek in the context of both the plaintiffs' complaint seeking a new use, and the defendants' counterclaims seeking expanded use from existing ditches. To determine whether surplus water was available for the parties, the District Court first made the overall fact finding that approximately 10,000 miner's inches of surplus water was available "during the months of May and June and until approximately the 15th day of July of the normal irrigating season." (Undisputed Facts, ¶ 10). The District Court then decreed surplus water in specific amounts to the various parties.

Petrich suggests the inclusion of the May to July dates in the findings of fact section of the *Petrich Decree* rather than in the conclusions of law means the District Court did not decree a period of use, leaving it unresolved. Although the May to July dates are not in the conclusions of law, the conclusions of law state that the parties "are owners of the right to the use of that quantity of the waters of Mill Creek and its tributaries in addition to their previous decreed rights, *hereinabove set forth in said findings of fact.*" (Doc. 13.00, Ex. A, Concl. of Law ¶ II) (emphasis added). The emphasized language concludes the District Court only decreed water it first found available in the findings of fact, which means water availability within a specific time window. The "purpose of findings of fact is to provide a foundation for the court's judgment." *In re Marriage of Johnson*, 1999 MT 254, ¶ 24, 296 Mont. 311, 989 P.2d 356. The District Court's findings of fact provided the foundation necessary to comply with the provisions of the 1921 statute for this particular adjudicated stream. The *Petrich Decree* contains no foundational facts to recognize water rights outside the period the District Court specifically stated. Because, as *Anaconda National Bank v. Johnson* recognized, the 1921 statute was the exclusive method of obtaining additional rights on an adjudicated stream, the District Court recognized no rights outside the period expressly stated in the findings of fact.

Petrich's predecessors accepted these foundational facts when they filed their claims as decreed rights, relying on the *Petrich Decree*. Petrich does not contend the

findings of fact in the *Petrich Decree* were erroneous. Nor does Petrich cite any case or provision of the 1921 statute that allows a court to ignore a specific set of foundational facts that form the basis of a district court decree. As the District Court's facts are undisputed and foundational to what it decreed, the District Court only decreed water within the May to July period. Petrich's assertion that the District Court did not include a period of use in the conclusions of law does not create a fact issue.

As TU correctly notes, interpretation of a prior district court decree is a question of law, not fact. *In re Quigley*, 2017 MT 278, ¶ 15, 389 Mont. 283, 405 P.3d 627. The unambiguous language and context of the *Petrich Decree* provides for a period of use of May 1 to July 15. TU met its burden to overcome the prima facie status of the period of use elements of the two claims with undisputed facts by referencing the same decree Petrich's predecessors relied on as the evidentiary basis for the claims.

2. *Do the abstracts of claims create an issue of material fact?*

Petrich argues an issue of fact exists as to period of use because the statements of claim filed by Petrich and other water users with decreed rights filed statements of claim with periods of use extending beyond May 1 to July 15. (Doc. 15.00, at 8). Petrich contends these filings and the absence of objectors, other than TU, creates a fact issue as to how the decree has been interpreted and applied over time with respect to period of use. Petrich asks the Court to take judicial notice of the period of use of the *Petrich* decree claims as the element appeared on the Preliminary Decree abstracts. (Doc. 15.00, at 8).

Regardless of whether the Court takes judicial notice of only the Petrich abstracts, or also abstracts belonging to third parties, the abstracts do not create a fact issue. Rather, the Petrich abstracts are the prima facie proof that TU has overcome by focusing its argument on what the District Court decreed. Rule 19, W.R.Adj.R. Under the rules of summary judgment, the burden shifts back to Petrich to show disputed facts about the period of use. To meet its obligation, Petrich must "by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." M. R. Civ. P.

56(e)(2). Simply citing back to the claims and abstracts and calling them prima facie proof does not establish a disputed fact issue. To create a disputed fact issue as to period of use, Petrich must provide evidence sufficient to prove historical use of these water rights outside what the District Court decreed. The claims and abstracts standing alone do not meet that burden.

3. *Does application of Montana's repealed change statute create an issue of material fact?*

Petrich next argues that even if the District Court decreed a period of use, the water rights change statute in place prior to July 1, 1973 authorized an expansion to the period of use so long as no one objected. (Doc. 15.00 at 9). Prior to its repeal, this statute stated:

The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, but which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Section 89-803, RCM (1947), *repealed* Ch. 452, Laws of 1973.

The plain language of this statute limited pre-1973 changes to point of diversion, place of use, and purpose of use. The statute did not authorize water users to expand the period of use and call it a change. Instead, water use outside the historical period of use was considered a new appropriation, with a priority date of the date of beneficial use. *See Quigley v. McIntosh*, 110 Mont. 495, 510, 103 P.2d 1067, 1074 (1939); *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 33, 407 Mont. 278, 502 P.3d 1080 (new water use is a new appropriation, not a change in place or manner of use). The only case Petrich cites to support their argument is *Hansen v. Larsen*, 44 Mont. 350, 120 P. 229 (1911). *Hansen* involved a change in purpose of use from mining to agriculture. Purpose of use changes were expressly authorized by the old change statute. *Hansen* says nothing about changes to the period of use element and it is not mentioned in the statute, so the case offers Petrich no support.

4. *Did DNRC change proceedings create an issue of material fact?*

Petrich asks the Court to take judicial notice of “the presence of change authorization information remarks as they appeared on the Preliminary Decree abstracts of the changed *Petrich* claims.” (Doc. 15.00, at 8). Petrich seems to suggest the Department of Natural Resources and Conservation (“DNRC”) tacitly endorsed a period of use beyond July 1 by approving change authorizations involving other claims decreed in the *Petrich Decree*. This does not create a fact dispute because DNRC does not address period of use in a change proceeding. Section 85-2-102(7), MCA (limiting changes to “change in the place of diversion, the place of use, the purpose of use, or the place of storage”). Even if it did, the factual authority Petrich provides consists of 119 pages of preliminary decree abstracts for other water users on Mill Creek. (Doc. 15.00, Ex. C). Petrich does not cite any analysis by DNRC of the historical use of claims 43B 101013-00 or 43B 101014-00 in the context of a change proceeding. More importantly, DNRC changes to existing rights always remain subject to the ultimate determination of the elements of the right by the Water Court. *Hohenlohe v. State*, 2010 MT 203, ¶ 31, 357 Mont. 438, 446, 240 P.3d 628, 633 (“water rights, regardless of whether they are approved for change of use by the Department, remain subject to final adjudication and quantification by the Water Court”); *Fellows v. Office of Water Comm'r*, 2012 MT 169, ¶ 15, 365 Mont. 540, 545, 285 P.3d 448, 452 (“the jurisdiction to determine existing water rights rests exclusively with the Water Court”).

5. *Does the Petrich Decree injunction provision apply?*

The parties disagree on the impact of an injunction provision contained in the *Petrich Decree* stating the parties to the decree and their successors are

forever barred and perpetually restrained and enjoined from asserting any claim to, or any right, title or interest in or to, the rights to the use of the waters of the said stream elsewhere herein awarded and decreed, and from interfering in any way with the use and enjoyment by such parties and their successors in interest of the said rights as herein awarded and decreed.

(*Petrich Decree*, Conc. of Law ¶ V).

TU argues this provision bars Petrich and all the other parties to the decree from using any of the waters from Mill Creek inconsistent with the terms of the decree. (Doc. 14.00, at 19-20). Petrich responds that TU is not a water user on Mill Creek entitled to enforce the injunction provision, and even if it were, the clause is “essentially district court boilerplate.” (Doc. 15.00, at 13).

The injunction clause did not prohibit future new water uses outside the scope of the decree. The potential for such new uses actually was contemplated by the 1921 statute, albeit with a penalty provision making such new water use junior to any subsequent appropriator.³ Section 89-837, RCM (1947); *In re Gravely*, Case 76G-187, 1994 Mont. Water LEXIS 12, *5 (“the penalty imposed by 89-837 R.C.M. *** does not mean that an appropriator who fails to comply with the act has no water right claim at all”) (water master order denying summary judgment). But TU’s argument in its motion is not about new uses after the *Petrich Decree*; rather it focuses on what the District Court actually did decree.

Even though the injunction clause does not directly support TU’s argument, the Court mentions it because Petrich argues in response that TU lacks standing to enforce the clause or “avail itself to the district court as it is not a party to *Allen* or *Petrich*.” (Doc. 15.00, at 13). To the extent Petrich argues TU cannot raise an objection to interpretation of a district court decree when it is not a successor to a party to the decree, Petrich is incorrect. Petrich’s predecessors put the interpretation of the *Petrich Decree* at issue when they filed the two claims as decreed rights. TU has proven the proper legal interpretation of the decree sets a period of use of May 1 to July 15. The Water Use Act does not bar TU or any other lawful objector from raising this challenge in a Water Court proceeding. *See Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, 361 Mont. 77, 255 P.3d 179. Thus, TU is not barred from relying on the legal interpretation of

³ Prior to its repeal in 1973, this provision stated in full:

Failure to comply with the provisions of this act deprives the appropriator of the right to use any water of such stream, or other source of supply, as against any subsequent appropriator mentioned in or bound by a decree of the court.

the *Petrich Decree* to overcome the prima facie status of the period of use elements of these two claims. Because the undisputed facts establish the scope of the period of use for these decreed rights is limited to May 1 to July 15, TU is entitled to summary judgment.

ORDER

Therefore, it is ORDERED that TU's motion for summary judgment is GRANTED. The period of use and period of diversion elements of claims 43B 101013-00 and 43B 101014-00 are modified to May 1 to July 15. The Court will issue a separate order setting a conference to discuss whether any additional proceedings are necessary for this case in light of this ruling.

ELECTRONICALLY SIGNED AND DATED BELOW

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